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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 232

H. W. KELLEY, ET AL.,

Petitioners,

vs.

EVERGLADES DRAINAGE DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 215), in this case is reported in *127 F. (2d) 808, Advance Sheet, June 22, 1942.*

JURISDICTION

Petitioners' brief seeks to have this Court exercise its discretionary power of review by certiorari of the decision of the Circuit Court of Appeals affirming the District Court of the Southern District of Florida.

The brief sets forth no reasons why jurisdiction should be exercised but makes reference to the petition and notably the chief reason assigned is the estimated cost of Petitioners' appeal from the decree upon the merits which has been rendered by said District Court and is now on appeal to the Circuit Court of Appeals.

STATEMENT OF THE CASE.

For the purpose of correcting what we consider to be inaccuracies and omissions in the statement of Petitioners' case, we submit the following:

A sworn Petition for Confirmation of Plan of Composition was duly filed by the District alleging that creditors owning more than fifty-one per cent (51%) of its indebtedness had accepted said Plan (R. 1-4). The District Court entered an order that the petition be approved as properly filed (R. 88). Thereafter, Petitioners sought and obtained an extension of time in which to file objections and answers (R. 121); instead of filing answers and objections, they filed motions to vacate the order approving the petition as properly filed and to dismiss the Petition on the ground that the required 51% of the indebtedness had not been committed to the plan at the time the petition was filed because:

(A) The only creditor who had signed a consent at that time (The Ranson-Davidson Company, Inc.) had purchased the bonds from a Bondholders' Committee which, Petitioners alleged, did not have authority to pass title until the expiration of thirty (30) days' notice by the Committee to those who had deposited bonds with it;

(B) In the alternative, if title did pass, it passed to a syndicate consisting of The Ranson-Davidson Company, Inc., and three other companies, and, they alleged, The Ranson-Davidson Com-

pany, Inc., did not have authority to consent for the Syndicate. (R. 126-132; 91-120).

The Court received evidence concerning such factual allegations (R. 149-161), denied the motions, and appointed a Master to hear the case upon the merits (R. 170-172).

The hearing before the Special Master on the merits of the Plan of Composition began on September 30, 1941, and was completed on December 1, 1941, with Petitioners as principal objectors.

On March 3rd, 1942, the Master filed a report recommending confirmation of the Plan and finding that:

> "More than ninety per cent (90%) of the holders of both classes of debts have consented to, and accepted the Plan in writing. Some holders of both classes of debts, have taken no stand either for or against it. About two and one-half per cent (2½%) of the holders of debts, of both classes, are objecting to its confirmation." (R. 197-198).

On March 27, 1942, the Court approved the report and adopted the findings of the Master; and on April 6, 1942, the Trial Court entered the Interlocutory Decree confirming the Plan of Composition. (R. 200-207).

All of these facts are accurately and succinctly recited in the opinion of the Circuit Court of Appeals, and that Court now has before it the Petitioners' appeal from the Decree upon the merits.

ARGUMENT.

Before replying to the points of argument in Petitioners' brief, we submit that there is absolutely no jurisdictional question involved. Neither the petition nor the brief assign any reason why this Court should at this stage of the proceedings consider this case. It is just another instance of a case condemned by this Court where, speaking through Mr. Chief Justice Taft, it was

said "jurisdiction to issue writs of certiorari was not conferred merely to give the defeated party in the Circuit Court of Appeals another hearing." *MAGNUM IMPORT COMPANY vs. HOUBIGANT, INC., 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922, 924.*

POINT I.

The opinion in OUERBACKER v. HENDERSON COUNTY, 4 Cir., 126 F. (2d) 309, is relied upon by the Petitioners to present a conflicting opinion by the two circuit courts of appeals. The facts are not comparable as was recognized by the Fifth Circuit in the opinion written in the instant case because that opinion was cited as authority for the decision here under attack.

In their Argument on this point, the Petitioners entirely overlook the fact that the Syndicate members expressly authorized the execution of the acceptance or consent under date of June 10, 1941 (R. 164-165).

The Petitioners have also completely ignored the acceptance or consent executed under date of June 12, 1942 (R. 161-162) by one of the syndicate members under authority of the above mentioned authorization.

The record clearly shows that the Petition alleged that the requisite amount of claims had been committed to the plan; and, both the District Court and the Circuit Court of Appeals found that the Plan had been sufficiently accepted before the filing of the Petitioners' technical motions.

The burden of the Petitioners' Argument is that the Bondholders' Committee sold the bonds to the Syndicate before it was authorized to do so.

Petitioners, however, had no right to raise the objection that the bonds of other Committee depositors had not been sold lawfully. The trust agreement was between the depositing bondholders and the Committee

for "the depositors, each for himself, but not for the others, or any of them."

The same trust agreement was before the Court of Appeals of Ohio in *BECHTEL v. RORICK, 30 N. E. (2d) 451,* in which a small group of depositors were trying to assert rights on behalf of themselves and all other depositors. The Court held that each bondholder could speak only for himself, and not for the others, in view of the provision quoted in the above paragraph from the agreement.

Moreover, Petitioners' motions and the generous quotations therein show that authority to make the sale of the bonds was given to the Committee separately and in addition to that conferred by the amendment to the agreement, and that such authority existed at the time of the sale, which was before the Petition was filed.

Petitioners' Motions show:

(1) Prior to June 6, 1941, there had been deposited with the Committee $8,073,000.00 of bonds, $51,000.00 thereof had been paid, leaving $8,022,000.00; (R. 96)

(2) On April 24, 1941, the Committee requested written authority from its depositors to make the sale of the bonds; (R. 96)

(3) By June 6, 1941, such written authority had been received; (R. 96) except as to some of the depositors (R. 98)

(4) On June 6, 1942, pursuant to such authority, the sale of the bonds was made; (R. 96)

(5) Some of the depositors did not give the written authority so requested, and it became necessary to adopt the amendment to the trust agreement so that those who had not given the direct written authority could either with-

draw within the thirty days, or consent by not withdrawing. (R. 98)

(6) On June 6, 1941, when the bonds were sold to the Syndicate, the Committee reserved the right to repurchase any bonds, the depositors of which elected to withdraw within the thirty day period (R. 98)

(7) Petitioners elected to withdraw their bonds. (R. 102).

This shows that the holding in this case is not in conflict with the rule announced in the Ouerbacker case because *even under the Petitioners' contentions, title to the bonds passed out of the Committee into the Syndicate thirty days after June 6, 1941, which was two months before the Petitioners filed their motions.* In other words, the facts bring this case squarely within the rule announced in the Ouerbacker case, because the Motions were not filed until after the title passed, which made the acceptance good even though we admit (which we do not) that title did not pass until thirty days after June 6, 1941. This is exactly what happened in the Ouerbacker case—the acceptances were secured and filed after the Petition was filed, but before the objection was raised, so, the Court said: (Text 314)

> " * * * As it was, no objection on this score was made until the answer of the appellant was filed on July 26, 1941, and the motion to dismiss was not made until the final hearing on September 4, 1941; and *in the meantime, as we have seen, acceptances of the plan in composition had been received from the holders of more than 93 per cent of the bonds, that is, sufficient acceptances not only to support the petition, but also to justify the decree. Under the circumstances,* we think that *the District Judge properly refused the motion to dismiss.* It must be borne in mind that the plan of composition was the same in effect as the 1940 plan which a short time before had been presented

> to and accepted by the bondholders; and that the requirements of the Act had been met by the written acceptance of an overwhelming majority of the creditors, there being but one objector, and that *the objection could have been met completely on September 4, 1941, merely by refiling the petition.*"
>
> *(Italics Ours)*

It would have been mere idle ceremony to have required the refiling of the Petition. The familiar maxim, lex non cogit ad vana sev inutilia, is particularly applicable.

The Circuit Court of Appeals for the Fifth Circuit might well have said what the Circuit Court of Appeals for the Fourth Circuit said in the last paragraph of its opinion in the Ouerbacker case, text 316, viz:

> "We reach the conclusion, after a consideration of all the arguments which the sole objecting bondholder has taken great pains to offer, that the case is of the precise kind that the Municipality Bankruptcy Act was intended to meet, to the end that the efforts of a municipality and its creditors co-operating in good faith to readjust its financial difficulties will not be defeated without good cause by a recalcitrant minority, no matter how persistent."

The Petition for Confirmation had attached to it an exhibit showing a consenting creditor, The Ranson-Davidson Co.—$7,005,000.00, (R. 35). The list of non-consenting creditors included The Ranson-Davidson Co. (Conditional Title)—$1,017,000.00. R. 71). The "conditional title" bonds were those which the Committee reserved the option to repurchase as mentioned in paragraph (6) above. Full evidence on this transaction was introduced at the hearing in the Trial Court.

The $7,005,000.00 of bonds thus committed to the Plan, together with the $1,017,000.00 "conditional title"

bonds aggregate the $8,022,000.00 of bonds held by the Committee (R. 99). While it is true that the Petitioners' bonds, in the approximate amount of $222,000.00, were erroneously placed in the $7,005,000.00 list of bonds sold outright to the Syndicate, when Petitioners had not given a direct written authorization to the Committee, no harm was done; and the result was not affected because the Petitioners owned only about two per cent (2%) of the bonded indebtedness. The bonds had been sold to the Reconstruction Finance Corporation before the Syndicate was advised of the error and of the Petitioners' election to withdraw. The Petitioners refused to accept substitute bonds deposited (R. 112). Thereafter, the Reconstruction Finance Corporation redelivered the identical bonds to the Committee for their return to Petitioners.

S. H. Ranson, Jr., Vice-President of The Ranson-Davidson Company, testified that the Syndicate of his company and three others purchased the bonds prior to the signing of the consent to the Plan (R. 150; 149), and that the bonds had been delivered to him at that time (R. 150; 149).

After the Reconstruction Finance Corporation purchased the bonds from the Syndicate, it executed a new acceptance of the Plan, at which time, it owned over 90% of the entire debt (R. 177).

POINT II.

The decision of the Circuit Court of Appeals DOES NOT countenance an exercise of power by the District Court in excess of the limited jurisdiction conferred by the Bankruptcy Act.

It is noted that no authorities are cited by the Petitioners in support of their contention that the required acceptance of the plan is a jurisdictional prerequisite to the filing of the Petition; but be that as it may, the

point is purely academic because, admitting for the sake of argument that the 51% requirement is jurisdictional, it is beside the question for the reason that the requirement was fully met when the Petition was filed. The District Court and the Circuit Court of Appeals properly so found.

2 AM. JUR. 944, aptly says:

> "Appeals are not allowed for the purpose of settling abstract questions, however interesting or important to the public generally, but only to correct errors injuriously affecting the appellant."

POINT III.

The Petitioners have misconceived the rationale of the decision of the Circuit Court of Appeals.

A mere cursory reading of the decision will show that the following excerpts therefrom is the real rationale thereof: (Text 809-810)

> "It is not shown that Ranson-Davidson Company attempted to give consent to the plan of composition for the bonds owned by any objecting creditor. Members of the syndicate have made no objection to the consent given, and it appears that they expressly authorized, ratified, and approved the action taken by Ranson-Davidson Company. Indeed, it appears that holders of over ninety per cent in amount of the District's indebtedness consented to and accepted the plan, and that, including these appellants, holders of only two and one-half per cent of the indebtedness objected to confirmation of the plan of composition. Moreover, after acceptance of the plan by Ranson-Davidson Company and the filing of the petition, Reconstruction Finance Corporation was authorized by the court to acquire the bonds

held by Ranson-Davidson Company, and thereafter Reconstruction Finance Corporation accepted the proposed plan of composition in writing.

"* * * The issues of fact and of law raised by the motions to dismiss were fully heard and considered by the trial court. Its ruling was fully supported and will not be disturbed. See Ouerbacker v. Henderson County, 4 Cir., 126 F. 2d 309."

The decision does not *concede* that the contentions of the Petitioners are "technical defects" but refers to them as "alleged technical defects", (127 F. (2d) 808). The Circuit Court of Appeals is to be commended for brushing such "alleged technical defects" aside. The spirit of all modern judicial reform is in that direction.

POINT IV.

The decision of the Circuit Court of Appeals imposes no burdens on the Petitioners.

There is no obligation on the Petitioners to appeal from the Interlocutory Decree. They fail to show wherein they are so obligated. But most significantly they have not shown how they are prejudiced by the decision of the Circuit Court of Appeals.

3 AM. JUR. 555, 559, states:

"It is a fundamental rule of modern appellate procedure that in order to warrant a reversal, the error complained of must have been prejudicial to the substantial rights of the appellant or plaintiff in error. Error going only to immaterial, minor, or technical questions is not ground for reversal, especially where it does not touch the controlling questions, or where controlling questions are correctly decided. In other words, an appellate court will not search

for reasons to reverse a case; the duty rests upon the appellant or plaintiff in error to show that error has intervened to his prejudice."

The Circuit Court of Appeals therefore properly said: (Text 810)

"(3, 4) This appeal does not raise issues respecting the equity or fairness of the plan of composition which was confirmed by the trial court after the coming in of the master's report and a hearing, and no good purpose could be served by reversing the cause for *alleged* technical defects in and about the filing of the petition and requiring the District to start over again at the beginning. Such procedure would result in much delay, and would put the District and the creditors to additional, unnecessary, and useless expense."

(Italics Ours)

CONCLUSION

There is no occasion for the granting of a writ of certiorari to review the decision of the Circuit Court of Appeals because that decision is not in conflict with the rule announced in *OUERBACKER v. HENDERSON COUNTY*, 4 *Cir.*, 126 *Fed.* (2*d*) 309, and did not countenance an exercise of power by the District Court in excess of its jurisdiction, so the Petition ought to be denied.

Respectfully submitted,

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